UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY DIGIORGIO Appellant, v. DEPARTMENT OF THE NAVY Agency.	DOCKET NUMBER DC-1221-97-1119-W-1 DATE: September 15, 1999

Charles H. Allenberg, Esquire, Neil C. Bonney & Associates, Virginia Beach, Virginia, for the appellant.

Joseph R. Barco, Portsmouth, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision, issued December 16, 1997, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition, AFFIRM the initial decision IN PART, REVERSE the initial decision IN PART, and REMAND the appeal for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The appellant is an Electronics Engineer with the agency's Fleet Technical Support Center, Atlantic (FTSCLANT) in Portsmouth, Virginia. In this individual right of action

(IRA) appeal,[11] he alleged that the agency engaged in several acts of reprisal for his having disclosed various forms of fraud, waste, and abuse. Among other things, he alleged that: He was threatened with termination if he did not participate in cardiopulmonary resuscitation (CPR) training, despite medical documentation he provided that showed that such training was harmful to him; his ability to hold a security clearance was being investigated; he was prevented from going aboard ships, a regular part of his job duties, for approximately one month in early 1997; he had been deprived of the opportunity to work overtime; he was rated less than outstanding for the 1995-1996 rating period; he was questioned during an investigation regarding the theft of computer equipment; he was harassed regarding the theft of a laptop computer that had been in his custody; and he was denied a promotion when his position warranted upgrading. Initial Appeal File (IAF), Tabs 1 & 4.

¶3 In dismissing the appeal for lack of jurisdiction, the administrative judge (AJ) held that: (1) The CPR matter, the security clearance issue, and the two computer incidents did not constitute personnel actions under 5 U.S.C. § 2302(a)(2)(A); (2) although the appellant's performance appraisal was a covered personnel action, that appraisal could not have been retaliation for his publication of an electronic book on the Internet in December 1996; (3) assuming that the agency's alleged refusal to allow the appellant to work aboard ships during January/February 1997 was a personnel action, this action was temporary in nature and was not a documented personnel action subject to cancellation, rescission, or other corrective action, and was therefore moot because no meaningful relief could be granted; and (4) the appellant's contention that he had been denied a promotion could not be considered because he had not raised the matter with the Office of Special Counsel (OSC) before filing his IRA appeal. On PFR, appellant reiterates some of his allegations that the agency retaliated against him by (1) threatening to remove him for refusal to take a CPR course; (2) threatening to revoke his security clearance;(3) barring him from going on board ships in early 1997 and otherwise reducing his overtime opportunities; and (4) lowering his performance appraisal in 1996.[2] 2

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[1] An IRA appeal is an appeal authorized by 5 U.S.C. § 1221(a) with respect to certain personnel actions, defined in 5 U.S.C. § 2302(a)(2)(A), that are allegedly threatened, proposed, taken, or not taken because of the individual's whistleblowing activities. 5 C.F.R. § 1209.2(b)(1). "Whistleblowing" is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b).

[2] In his petition for review, the appellant does not allege error with respect to the AJ's findings with respect to the two computer incidents or with respect to the alleged denial of promotion. We therefore do not review those findings. *See* 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely filed petition for review).

ANALYSIS

The AJ correctly concluded that any threats to the appellant's security clearance are not reviewable in IRA appeals.

¶4 The appellant contended that his ability to hold a security clearance, which was necessary to perform his job duties, was being investigated and threatened because of his whistleblowing disclosures. IAF, Tabs 2 & 4. The AJ found that this did not constitute a personnel action reviewable in an IRA appeal. Initial Decision (ID) at 2.

¶5 Subsequent to the issuance of the initial decision in this appeal, the Board has held that the denial, revocation, or suspension of a security clearance is not a personnel action under the 1994 amendments to the Whistleblower Protection Act of 1989 (WPA), and that the Board therefore lacks jurisdiction over such claims in IRA appeals. Roach v. Department of the Army, MSPB Docket No. DC-1221-97-0251-W-1, slip op. ¶ 48 (June 11, 1999). We therefore find that the AJ correctly determined that the Board lacks jurisdiction to consider any claims relating to the appellant's security clearance.

Although the AJ failed to apprise the appellant of what he must prove to establish the Board's jurisdiction, the record indicates that the appellant was aware of jurisdictional requirements.

¶6 An appellant must receive explicit information on what is required to establish jurisdiction. Burgess v. Merit Systems Protection Board, 758 F.2d 641, 643-44 (Fed. Cir. 1985). The Board set out the jurisdictional elements of an IRA appeal in 1994, holding that an appellant must show by preponderant evidence that: (1) He engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2); and (3) he raised the issue before the OSC, and proceedings before the OSC were exhausted. Geyer v. Department of Justice, 63 M.S.P.R. 13, 16-17 (1994); White v. Department of the Air Force, 63 M.S.P.R. 90, 94 (1994). In order to be entitled to a jurisdictional hearing, an appellant must make a nonfrivolous allegation of facts to support these elements, i.e., an allegation of facts which, if proven, could establish a prima facie case as to each of these elements. See Singleton v. Ohio National Guard, 77 M.S.P.R. 583, 586 (1998).

¶7 The only guidance provided by the AJ regarding these jurisdictional elements was the following language in the order acknowledging receipt of the appeal:

> The Board has jurisdiction over appeals by an employee . . . with respect to a personnel action taken, proposed, threatened, or not taken because of the individual's whistleblowing activities, as defined in 5 U.S.C. § 2302(b)(8). Therefore, your petition will be dismissed unless you allege facts which if true would show that a personnel action was taken, proposed, threatened, or not taken because of your whistleblowing activities. A "personnel action" is defined at 5 U.S.C. § 2302(a)(2)(A). See also 5 C.F.R. § 1209.4(a).

IAF, Tab 3.

¶8 The Board has held that this language does not "fully and clearly advise" the appellant of the evidentiary showing he must make under Geyer and White in order to establish Board jurisdiction. Lloyd v. Environmental Protection Agency, 71 M.S.P.R. 671, 676-77 (1996) ; see also Casciotta v. Department of the Navy, 69 M.S.P.R. 589, 592-93 (1996). In both Lloyd and Casciotta, the Board remanded the appeal to the regional office because of the lack of proper notice. The Board has not required a remand, however, if the agency's pleadings or other record evidence show that the appellant was adequately apprised of jurisdictional requirements. See Singleton, 77 M.S.P.R. at 587-88; Nichols v. Department of the Interior, 69 M.S.P.R. 386, 388-89 (1996). In its response to the appeal, the agency cited the three jurisdictional elements for IRA appeals. See IAF, Tab 6, Subtab 1. The appellant's representative, an attorney with a law firm experienced in representing appellants in Board appeals, also cited these three jurisdictional elements. See IAF, Tab 4. Under these circumstances, we conclude that the appellant was adequately apprised of the requirements for establishing jurisdiction.

The appellant made a nonfrivolous allegation of facts entitling him to a jurisdictional hearing concerning whether his electronic book contained a whistleblowing disclosure.

¶9 Because the AJ found that all of the agency actions about which the appellant complained either did not constitute personnel actions covered under the WPA, or were moot, he did not consider whether the appellant had established that he made a disclosure under 5 U.S.C. § 2302(b)(8). Because we find, as detailed below, that the appellant has established the existence of personnel actions that are not moot, we next consider whether the appellant made an allegation of whistleblowing sufficient to entitle him to a jurisdictional hearing.

¶10 The appellant alleged that he had made the following whistleblowing disclosures: (1) a July 1993 disclosure to upper management about agency officials participating in gross mismanagement and a gross waste of funds with respect to maintenance and inspection of automated ships; (2) information provided to Inspector General personnel in 1995; (3) suggestions regarding waste provided in January 1996 to the five major commands in his chain; (4) information provided to each member of the Senate Armed Services Committee in March 1996; (5) a complaint filed with OSC on November 16, 1996, in which he disclosed waste and abuse in connection with the destruction of an engine aboard a U.S. Navy ship; (6) disclosures he presented to the Commanding Officer of FTSCLANT on November 18, 1996; and (7) an electronic book he published on the Internet on December 18, 1996. IAF, Tab 4.

¶11 To be entitled to a hearing on the jurisdictional requirement of having made a protected disclosure, the appellant must provide the Board with details of the specific behavior of the agency's personnel that predicated his whistleblowing. Ellison v. Merit Systems Protection Board, 7 F.3d 1031, 1037 (Fed. Cir. 1993); Keefer v. Department of

Agriculture, MSPB Docket No. SE-1221-96-0549-W-4, slip op. ¶ 11 (July 8, 1999). Conclusory, vague, or unsupported allegations are insufficient to meet this standard. Keefer, slip op. ¶¶ 10-11. The test to determine whether an IRA appellant had a reasonable belief in his disclosure is an objective one—whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee could reasonably conclude that the actions of the agency evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public health or safety. Lachance v. White, No. 98-3249, slip op. at 4-5 (Fed. Cir. May 14, 1999); Keefer, slip op. ¶ 14.

¶12 We find that, with the exception of the electronic book the appellant placed on the Internet in December 1996, none of the appellant's claims of whistleblowing are supported by a specific and/or detailed account of the alleged agency actions that would permit the Board to evaluate whether the appellant had a reasonable belief that the agency's actions evidenced one or more of the categories of wrongdoing set out in section 2302(b)(8). The appellant did not provide the Board with copies of the July 1993 disclosure, the alleged disclosures presented to OSC in case number MA-94-1685,[3]3 the information he provided to Inspector General personnel in 1995, the suggestions regarding waste he allegedly provided in January 1996 to the five major commands in his chain, the information he allegedly provided members of the Armed Services Committee in March 1996, or the disclosures he allegedly presented to the Commanding Officer of FTSCLANT on November 18, 1996. Nor has he described any of those alleged disclosures in a fashion detailed enough to constitute a prima facie case of having made a protected disclosure. Although the appellant did include a copy of his November 16, 1996 complaint to OSC (IAF, Tab 5, Exhibit A), that complaint did not make out a prima facie case of whistleblowing. We therefore conclude that the appellant is not entitled to a jurisdictional hearing on any of these alleged disclosures.

¶13 The appellant did provide one set of excerpts from his December 1996 electronic book that we find constitutes a prima facie case of whistleblowing:

> pg 12: "Neither can I threaten my supervisor that unless someone puts a time limit on it, I am going to charge all of the possible overtime, without working it. My supervisor knows it, has done it, when he was a working rep, and will allow me to do it, if I so wish."
>
> pg 31: "We have the most lenient overtime policy in the world. We go to a ship and work a few hours of overtime and charge for more hours than actually worked . . . We are called to work during off hours, and if we are dumb enough to charge for what we actually worked, we soon find out that our co-workers are charging for twice as much. Because

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> many people are cheating at it, and supervision knows it, we become trapped in the mess."
>
> pg 39: "We really are nothing more than overpaid mechanics with too much supervision, with an ASSIGN YOUR OWN OVERTIME POLICY."

IAF, Tab 5.

¶14 The clear import of this language is that the appellant has personal knowledge of employees fraudulently claiming entitlement, and receiving payment, for overtime hours that they did not in fact work. We note that the appellant did not identify any particular laws, rules, or regulations that such behavior would violate. Some allegations of wrongdoing, however, such as theft of government property or fraudulent claims for pay, so obviously implicate a violation of law, rule, or regulation, that an appellant need not identify any particular law, rule, or regulation.[4]4

¶15 Accordingly, we find that the appellant has made a nonfrivolous allegation of making one whistleblowing disclosure, and he is entitled to a hearing to prove that element of his jurisdictional burden.

The AJ erred in finding that the appellant did not allege a covered personnel action related to the CPR training.

¶16 The AJ found that "it is clear" that the appellant's allegations of reprisal regarding the CPR training did not involve a covered personnel action. ID at 2. We disagree. The appellant specifically alleged that he was threatened with termination of employment if he refused to participate in CPR training. IAF, Tabs 4 & 5. A threatened removal is a personnel action covered under 5 U.S.C. § 2302(a)(2)(A).

¶17 Despite the AJ's error in this regard, the appellant made no allegation that, subsequent to his December 1996 disclosure, there were instances in which he was threatened with termination if he refused to participate in CPR training. The December 1996 disclosure cannot have been a contributing factor to any prior threats to terminate the appellant's employment over the matter of CPR training. Thus, with regard to the alleged threatened removal, the appellant has not stated a claim on which he can prevail on the merits and he therefore may not pursue this alleged personnel action on remand. Orr v. Department of the Treasury, MSPB Docket No. SF-1221-98-0069-W-1, slip op. ¶¶ 15,16 (July 27, 1999). For the same reason, he may not pursue his contention that his 1996 performance appraisal was taken in retaliation for whistleblowing.

The AJ erred in finding that a denial of overtime is not a personnel action covered under the WPA.

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¶18 The AJ found that the appellant's claim that he was denied the opportunity to earn overtime pay because of his whistleblowing disclosures did not implicate a covered personnel action. ID at 2-3. A "decision concerning pay" is one of the personnel actions covered under the WPA. 5 U.S.C. § 2302(a)(2)(A)(ix). The denial of opportunities to earn overtime pay that an employee would otherwise have been provided is clearly a decision concerning pay. We therefore find that the appellant alleged a personnel action in this regard. For the reasons discussed above, however, only denials of overtime pay occurring subsequent to the December 1996 disclosure would be actionable.

The appellant's claim that the agency retaliated against him for whistleblowing by refusing to let him perform duties aboard ships is not moot.

¶19 The administrative judge ruled that, assuming that the agency's alleged refusal to allow the appellant to work aboard ships during January/February 1997 was a personnel action, this action was temporary in nature and was not a documented personnel action subject to cancellation, rescission, or other corrective action, and was therefore moot because no meaningful relief could be granted. ID at 4. The appellant alleged, however, that this action deprived him of the opportunity to earn overtime pay during this period of time. IAF, Tab 4. If the appellant can establish a likelihood that he would have earned overtime pay if he had been allowed to work aboard ships during the period in question, there is a remedy the Board could provide if it determined that the agency's action was retaliation for whistleblowing. Cf. Gannon v. U.S. Postal Service, 67 M.S.P.R. 660, 665 (1995) (for purposes of back pay awards, overtime may be computed based on either the employee's pre-removal overtime assignments or the overtime worked by similarly situated employees). We therefore find that this alleged action, which occurred after the alleged December 1996 disclosure, is not necessarily moot.

ORDER

¶20 Accordingly, the appeal is REMANDED to the Washington Regional Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

[1] An IRA appeal is an appeal authorized by 5 U.S.C. § 1221(a) with respect to certain personnel actions, defined in 5 U.S.C. § 2302(a)(2)(A), that are allegedly threatened, proposed, taken, or not taken because of the individual's whistleblowing activities. 5 C.F.R. § 1209.2(b)(1). "Whistleblowing" is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross

mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b).

[12] In his petition for review, the appellant does not allege error with respect to the AJ's findings with respect to the two computer incidents or with respect to the alleged denial of promotion. We therefore do not review those findings. *See* 5 C.F.R. § 1201.114(b) (the Board normally will consider only issues raised in a timely filed petition for review).

[3] Although the appellant cites to this earlier case and alleges that he received corrective action as a result of it, there is no specific evidence in the file regarding the case. (*See* IAF, Tab 4)

[4] An abuse of overtime as described by the appellant would clearly violate 5 C.F.R. § 2635.705(a), which provides that an employee shall use official time in an honest effort to perform official duties.